85-1176

Supreme Court, U.S.
FILED
NOV 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MORRIS I. COHEN

Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Morris I. Cohen
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30PP

QUESTIONS PRESENTED

1. Was petitioner deprived of due process of law because the court entertained derogatory information submitted by petitioner's sister without benefit of rebuttal?
2. Was there denial of due process of law because the court ignored signed stipulation of the parties reflecting no deficiency and a credit of $20,557.00?
3. Was petitioner denied due process of law by the court by not having a hearing or rehearing notwithstanding the fact that petitioner had requested a hearing in his memorandum brief?

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Opinion Below

The opinion below in the form of a mandatory order and judgment affirming the decision of the United States Tax Court (Appendix A) without reference to the stipulations of the parties signed and entered into the record stating that petitioner was entitled to a credit of $20,557.00 rather than a deficiency of $1149.00. (Appendix B and Appendix C)

There was no hearing or rehearing by the United States Court of Appeals for the Tenth Circuit.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Tenth District was entered on June 26, 1984. Jurisdiction of this court is invoked under Title 28 U.S.C. Section 1254.

Statutes Involved

The Internal Revenue Code Section 105(d) providing for a disability income provision with an exemption certificate identified as form 2440 was removed from petitioner's file prior to being examined by the Internal Revenue Service.

CONSTITUTIONAL PROVISIONS

Fourth Amendment

Unreasonable searches and seizures.--

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ***"

Agents of the Internal Revenue Service have regularly burglarized petitioner's residence and stolen his papers and effects.

Fifth Amendment

Due process of law and just compensation clasuses.

> "Nor be deprived of life, liberty or property without due process of law ***"

Petitioner has been deprived of due process of law by the United States Government as delineated by:

1. Unsigned deficiency assessments and non-confrontation of same.
2. Non-confrontation of petitioner's sister as to his moral character.
3. Ignoring of the respondent and the court as to stipulation signed by the parties, as provided for in rule 155(a) of the TC Rules

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Title 18 U.S.C. Secs. 2517-2520. This was based on allegation of wiretapping by agents of Internal Revenue Service.

Title 28 U.S. C. Sec. 1254 which is the jurisdictional statute granting this court such power on appeal from the United States Appeals Court of the 10th District.

Title 28 U.S.C. Sec. 105(d) which is the statute that provides for the certificate of exemption for total disability.

United States Tax Court Rule 155(a) which provides for settlement between the parties after the trial. (Infra Appendix D)

United States Tax Court Rule 91(e) which provides for mandatory stipulation by the parties prior to going to trial which was ignored by the trial judge and the U.S. Court of Appeals. (Appendix E)

Internal Revenue Code Sec. 6501 provides for the 3 year statute of limitations to run where there has been fraud in the assessment of the deficiency.

United States Tax Court Rule 155(a). Appendix F This rule provides the monetary settlement between the parties if any after the tax court decision.

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Tax Court Rules. 155(a)

STATEMENT OF THE CASE

Petitioner was subjected to an office audit audit by the Internal Revenue Service of Indianapolis, Indiana, and a deficiency assessment was made without petitioner ever being confronted with the findings and to rebut same. The deficiency assessment was received by petitioner after he left the State of Indiana and was living in the State of Colorado at the time he received notice of assessment for the years 1978, 1979 and 1980. The assessments for the 3 years were based on the addition of $5200.00 for each of the above years on respondent's non-allowance of disability exclusion income under Section 105(d) of the Internal Revenue Code. The $5200.00 was added to the gross income because some one at the Indianapolis had illegally removed forms 2440 from each of the above files and the assessment was based on the absence of such certificates

of exemption.

Subsequently petitioner and Ms. Olsen, attorney for respondent held a conference in the government office which petitioner had reason to believe was bugged. A stipulation conference was held in the chambers of Judge Drennen, tax court judge, and it was agreed in the stipulation which was signed by the parties that there would be allowance of disability exclusion for all three years. The stipulation with compation Computation attached Appendix E(infra) stated that there would be a carryover loss of $20,557.00 and no deficiency for all three years. Judge Drennen rejected 3 attempts for the parties to conform to Rule 155(a) of the Tax Court Rules which indicated a credit to petitioner of $20,557.00. Petitioner moved to Tukwila, Washington (Seattle) and the judge approved a deficiency of $1149.00 with non-approval of petitioner and completely contrary to the stipulation

of the parties. The case was originally assigned to Judge Thornburgh, Jr., and Judge Drennen took over the case six months after the original assignment and there is no procedure in the Tax Court Rules that provides for a change of judge. Petitioner submits that the foregoing was a denial of procedural due process of law. Petitioner also submits that Judge Drennen took 15 months after the day of the trial to render a decision. It was significant that the Court issued its decision 4 days after petitioner had moved and his leg brace for service-connected paralysis incurred in World War II was stolen by movers of his household goods.

REASONS FOR GRANTING THE WRIT

1. Petitioner learned that the U.S. Court of appeals had entertained derogatory information concerning his moral character from petitioner's sister, Gladys Nisenbaum, which was totally untrue and because the court did not apprise the

the petitioner of such charges constituted a denial of due process of law as delineated by the Fifth Amendment to the Constitution of the United States. There has never been too much affection between petitioner and his sister. It is submitted that petitioner's sister was motivated to contact the United States Court of Appeals because her friend in the employment of the Internal Revenue Service was on the verge of being discharged because she had removed forms 2440 Certificate of Disability Income exemption as required pursuant to the Internal Revenue Code Section 105(d), from petitioner's file and which was subsequently audited without benefit of such exemption which resulted in $5200.00 a year being added to appellant's deficiency. The audit was made without petitioner's being able to confron the auditor who was nameless. This was also a denial of due process of law under the Fifth Amendment.

With regard to the allegations of moral depravity which petitioner's sister communicated to the U.S. Court of Appeals petitioner posits the issue that the United States Court of Appeals is a court of law and not a court of morals.

2. The United States Court of Appeals below did not address the issue of signed stipulation of the parties which delineated petitioner's liability and was ignored by the court although this was explored thoroughly by the petitioner in his brief and which Court of Appeals did not refer to in its opinion. Under United States Tax Court Rule 91(e) it is mandatory for the parties to stipulate before coming to trial. Such stipulation was entered into in the chambers of Judge Drennen before coming to trial. There was no deficiency in the stipulation but a credit to petitioner of $257,000.00 in the

form of a net loss carryover.

The original deficiency as submitted by the Internal Revenue Office at Indianapolis was unsigned (Appendix F, infra) which is a violation of the Internal Revenue Code Section 6501 which mandates that all papers must be signed by the taxpayer and./or the the Internal Revenue Service. A fortiori when petitioner was not given the opportunity to contest the deficiency which is in itself a denial of Due Process of Law under the Fifth Amendment to the Constitution. The foregoing was also ignored by the United States Court of Appeals for the 10th Circuit.

4. The Court of Appeals also ignoredthe fact that removal of the Certificate of Disability Income exclusion under Section 105(d) of the Internal Revenue Code by an employee of the Internal Revenue Service constituted fraud under the Fifth Amendment by depriving petitioner of the entire file and which permittted the 3 year statute of limitations to

run.

4. No response was ever made to petitioner's allegation that in his first interview with Ms. Cynthia Olsen, attorney for respondent appellee in a government office that the government office was bugged and was contrary to the Fifth Amendment of the Constitution of the United States under the due process clause of law criteria.

5. Petitioner has reason to believe that his telephone has been wiretapped by agents of the Internal Revenue Service without obtaining a court order pursuant to Title 18 U.S.C. Secs. 2517-2520. The foregoing would be a violation of the Fourth Amendment to the United States Constitution also.

6. Petitioner has reason to believe that a woman whose maiden name was Barbara Pazol also had a hand in besmirching petitioner's character. She is the daughter of Morton Pazol a communist. Petitioner occasionally played contract bridge with him and he was

angry at him because petitioner resisted his ideology. On the night of June 18, 1985, she was waiting for petitioner in the parking lot of a fast food restaurant and started to act in a most bizarre manner such as a harlot passing in front of petitioner several times. No word was spoken to her by petitioner. Petitioner recognized her immediately, and since that time petitioner has reason to believe that she also alleged moral depravity on the part of petitioner.

Petitioner submits that the United States Court of Appeals and the United States Tax Court were preoccupied with petitioner's disability incurred in World War II. Petitioner is 70% disabled with loss of use of his left leg which when totaled separately was and is over 100%. The Veterans Administration uses an average to bring it down to 70%. Petitioner's disability was botched by the medical doctor in the army who neglected to check for nerve damage. The army cannot

be sued for malpractice so petitioner was afforded the foregoing percentage of disability after 20 examinations by the Veterans Administration. The 70% disability rating was arrived at within the framework of Veterns Administration regulations.

On page 7a of petitioner's brief in his appeal to the United States Court of Appeals for the 10th Circuit seven reasons were given by petitioner that he should be afforded a hearing. No hearing or rehearing was allowed. This case was not frivolous because a docketing statement as required by the 10th Circuit was approved and determined that the case had merit. Petitioner therefore submits that he was denied due process of law under the Fifth Amendment to the Constitution of the United States.

Petitioner is reminded of the Frederick case recently concluded in the United States District Court in Denver (for which there is no citation available) in which the petitioner was bankrupted by the tactics of the

Internal Revenue Service.

As a general observation if the Internal Revenue Service continues its disregard for violation of the law such as has occurred with petitioner the whole tax structure would be jeopardized.

And finally petitioner closes this petition for a writ of certiorari with a Latin Maxim "Ratio est legis anima; reason is the soul of the law." The reason for the interference in this by Gladys Nisenbaum (petitioner's Sister) was motivated to derogate petitioner was to try to salvage the job of her friend employed by the Internal Revenue Service. This employee displayed her animosity to petitioner when the disability income exclusion was enacted by Congress requiring a form 2440 with a doctor's certificate. She requested a signed doctor's certificate from petitioner in the Indianapolis office before it was effective. Congress delayed the effective date for one year. There is

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no love lost between petitioner and his sister, but there would have been no interference by her but for the fact that her friend in the Internal Revenue Service was on the verge of losing her job because she was the one that stripped all forms 2440 from the case file under disability income exclusion pursuant to Section 105(d) of the Internal Revenue Code. Petitioner submits this one last statement that shows how far off base a Court can go when it listens to uncorroborated information without rebuttal by one of the parties. The statement is that petitioner has been celibate for the last 15 years.

CONCLUSION

WHEREFORE, Petitioner prays that the Court grant him his Petition for Writ of Certiorari based on the Fourth Amendment, illegal search and seizure; the Fifth Amendment to the Constitution; being deprived of due process of law particularly with regard to the

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signed stipulation of the parties and all the other statutes hereinbefore mentioned.

Respectfully submitted,

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APPENDIX A-1 a

United States Tax Court

Opinion May 3, 1984

OPINION

The first issue for decision is whether petitioner is entitled to deduct the expenses which he reported on Schedule C attached to his returns. Petitioner claims that he is entitled to those deductions because he was in the trad or business of practicing law. Respondent on the other hand, argues that petitioner is not entitled to deduct these expenses for several reasons; the primary one being that petitioner's activities as an attorney were not engaged in for profit with the meaning of section 183.

Section 183(a) provides the general rule that if an individual engages in an activity and "if such activity is not engaged in for profit, no deductions attributable to such activity shall be allowed under this chapter except as provided in this section." Section 183(b)(1) provides that deductions which

would be allowable without regard to whether the activity is engaged in for profit shall be allowed, and and section 183(b)(2) provides that deductions which would be allowable only if the activity is engaged in for profit shall be allowed, but only to the extent that the gross income from the activity exceeds the deductions otherwise allowable under section 183(b)(1). Section 183(c) defines an activity not engaged in for profit as:

> Sec. 183(c). Activity not engaged in for Profit Defined-- For purposes of this section, the term "activity not engaged in for profit" means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212.

The standard to be applied in section 183 cases is whether the taxpayer engaged in the activity with an honest and bona fide objective of making a profit. Dreicer v. Commissioner, 78 T.C. 642 (1982) affd. with-

out opinion, 702 F. 2d 1205 (D.C. Cir. 1983). Whether this standard is met presents a question of fact to be determined from all the evidence. Petitioner has the burden of proof on this issue. Golanty v. Commr, 72 T.C. 411, 426 (1979), affd. in an unpublished opinion 647 F. 2d 170 (9th Cir. 1981). A taxpayer's declaration of his motive to make a profit is not controlling; greater weight must be given to objective facts.

In prior cases, to determine whether the taxpayer engaged in the activity with the objective of making a profit, this Court has considered the factors listed in section 1.183-2(b), Income Tax Regs.

Applying these relevant factors to the instant case, we believe that petitioner's legal practice was not an activity engaged in for profit. For example, petitioner's activities did not indicate a bona fide

objective of making a profit from the practice of law. There is no evidence that he made any effort during the years at issue to make it known that he was an an attorney available to represent clients.[7] He apparently did not "hang out his shingle", did not attend meetings of attorneys, spent no time around the courthouse except on his own affairs, and did not participate in community affairs, where he could come in contact with potential clients or client referrals. Petitioner's name in the telephone director indicated that he was an attorney, but he was not listed in the yellow pages of the directory.

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[7]We recognize that during the years in issue it was considered unethical for an attorney to advertise -- but there were other ways to establish an active practice.

The only office petitioner maintained was allegedly in his home. He apparently had no office equipment, supplies, or furnishings that would normally be present in a law office. So far as the evidence reveals the only legal books he had were the Indiana Annotated Statutes which probably were used for his personal activities more than his legal pursuits. Petitioner had no supporting staff and there is no evidence that petitioner made an effort to keep up with the law. There is no indication that that petitioner made an effort to keep up with the law. There is no indication that petitioner maintained any books or records concerning his legal activities. Section 1.183-2(b)(1). Income Tax Regs.

Petitioner also did not establish that he expended much time and effort in carrying on legal activities. Section 1.183-2(b)(3). Income Tax Reg. On the contrary, the record indicates that between the time petitioner was admitted to the bar, 1967, and the last year at issue, 1980, petitioner

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represented three clients -- each for a singular matter -- plus a handful of individuals who were referred by the Indianapolis Bar Association in the early years. And there is no evidence in the record that petitioner did legal work for any clients during the years before us or spent any time on legal work, and he received no income from the practice of law during those years.

Also petitioner sustained losses during each of the years in issue of $13,337, $8,025, and $9,730, and since his testimony indicated that he received, at a maximum, not more than $6,000.00 in legal fees since he was admitted to practice, it is quite likely that he suffered losses in all prior years. A record of such losses over so many years is pursuasive evidence that the petitioner did not have the requisite profit objective. Cf. Golany v. Commissioner, supra at 427.

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In sum, we agree with respondent that petitioner's so-called legal activities during the years in question were not engaged in for profit within the meaning of Sec. 183. Petitioner may have studied law in hopes that he could make a profit from the practice of law. But, it is evident that after a few years it appeared to petitioner that all doors were clsed" on his establishing a successful law practice, as he testified. we believe petitioner thereafter relied on his disability annuity income to support himself rather than the practice of law and that he made no genuine effort to earn income or make a profit out of the practice of law. Section 1.183-2(b)(8), Income Tax Regs. There is no evidence that any of the business expenses claimed by petitioner on his tax returns were in any way directly related to an activity that could be classi-

fied as the business of practicing law. Merely being admitted to practice law and retaining membership in good standing in the profession does not constitute the business of practicing law. Owen v. Commissioner, 23 T.C. 377, 381 (1954). We do not believe petitioner is entitled to deduct one-half of his living expenses as business expenses in the practice of law.

Moreover, section 262 precludes petitioner from deducting personal expenses, such as filing feesn in connection with litigation in which petitioner was a party. Petitioner also deducted expenses for items (e.g., charitable contributions, interest, taxes) which would otherwise be allowed as itemized deductions. Section 183(b)(1). However, the total amount petitioner expended on these items is below the zero bracket amount necessary for single taxpayers. Section 63(d).

On his 1978 return, petitioner also de-

ducted $1,805 for the cost of his trip to California. Petitioner contends that this expense is deductible as a job-hunting expense. This Court has held that expenses incurred in seeking new employment in the same trade or business are deductible under Section 162. See Cremona v. Commissioner, 58 T.C. 219 (1972). However, expenses incurred in seeking or investigating a new trade or business are not deductible under Section 162(a). Dean v. Commissioner, 56 T.C. 895 (1971)

Petitioner offered no convincing evidence or details to support his claim that he went to California to establish a legal practice there. His testimony indicated that he had a brother living in California and that his trip was more to visit his brother than to seek new employment practicing law.

Furthermore, because we had held that petitioner's activities were not engaged in for profit during the years in issue and further

since the record shows that petitioner abandoned any previous practice of law, petitioner was not in the trade or business of practicing law within the meaning of section 162(a) at the time of the trip. See Section 183(c). Consequently, even assuming that petitioner did travel to California to ascertain the possibility of practicing law in that state, his trip would be to investigate employment possibilities in a new trade or business. Accordingly, petitioner's job-hunting expenses are not deductible. See and Compare Haft v. Commissioner, 40 T.C. 2, 7 (1963); Reosinger v. Commissioner, 71 T.C. 568, 574 (1979).

Petitioner also deducted on his 1978 return $475 representing the cost of his moving from Indianapolis to Speedway, Indiana. Petitioner did not establish, however, that after he arrived at Speedway he was a full-

time employee or performed services as a self-employed individual or a full-time basis as required by section 217(c). Accordingly petitioner is denied this deduction.

The final issue for decision is whether petitioner is entitled to a NOL carryover from 1977 claimed on his 1978 Federal income tax return. This issue was not raised by respondent in the pleadings, nor at the trial. Respondent, however, argues that he should be allowed to amend the pleadings to conform to the proof offered at trial.

Rule 41(b)(1) permits an amendment of the pleadings to conform the to the evidence when issues not previously raised were tried with the express or implied consent of the parties. See e.g. Llorente v. Commissioner, 74 T.C. 260, 269 (1980), revd. in part and remanded, 649 F. 2d 152 (2d Cir. 1981)

(new issue not raised in pleadings decided by this Coour because parties argued issue at trial). Conversely, this Court will not consider issues that have not been pleaded and have not been expressly or implicitly consented to by the parties. Markwardt v. Commissioner, 64 T.C. 989, 997 (1975); Estate of Mandels v. Commissioner, 64 T.C. 61, 73 1975.[8]

Respondent contends that petitioner raised the NOL issue at the trial, and that we therefore should decide this issue. To support his position, respondent argues in his motion the following: the notice of deficiency made adjustments in petitioner's pension income and exclusion; to refute these adjustments, petitioner based his arguments "on the net operating loss statements attached to his form 1040. Thus, the petitioner has

put at issue the correctness of the net operating loss statements attached to his return."

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[8] See also Lepson v. Commissioner, T.C. memo 1982-304.

The short answer to respondent's contention is that the document attached to petitioner's returns was a "Statement of Operating Loss for the Year," which was simply a summary of information concerning all the items which comprise petitioner's tax liability. It does not pertain solely to the NOL issue. Furthermore, respondent did not question the correctness of the figures used by petitioner as the net operating loss carryover from 1977 in the notice of deficiency. No mention was made of it in respondents's answer and neither party mentioned it or presented any evidence with

respect to it at the trial

In sum, respondent in neither the pleadings nor at the trial raised the 1977 carryover NOL issue. Petitioner was not aware, and could not have been aware, that this was an issue at the trial. Consequently, petitioner cannot be held to have expressly or impliedly consented to the trying of such issue simply because he attached to his returns a statement summarizing items listed on his return. See also, Markwardt v. Commr. supra at 998. Respondent's position is beyond the scope of Rule 41(b) and this Court's interpretation of that rule. Therefore, respondent's motion must be denied.

Decision will be entered under Rule 155.

UNITED STATES COURT OF APPEALS FOR

THE SEVENTH CIRCUIT

Filed United States Court of Appeals Tenth Circuit June 26, 1985 Howard K. Phillips, Clerk

MORRIS I. COHEN Petitioner-Appellant	)	No. 84-2751
v.	)	T.C. No. 7078-82
COMMISSIONER OF INTERNAL REVENUE Respondent-Appellee	)	U.S. Tax Court

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ORDER AND JUDGMENT

Before Honorable James K. Logan and Honorable John P. Moore, Circuit Judges, and Honorable Bobby R. Baldock, District Judge.*

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*The Honorable Bobby R. Baldock, United States District Judge for the District of New Mexico, sitting by designation.

In accordance with 10th Cir. Rule R. 9(e) and Fed. R. App. P. 34(a), this appeal came on

for consideration on the briefs and record on appeal.

This is an appeal from a decision of the United States Tax Court upholding a determination of deficiency with regard to petitioner's tax year 1980. Based on the evidence presented at the trial, the Tax Court correctly determined that petitioner did not carry his burden of proof regarding the deductibility of alleged business-related expenses.

Petitioner's brief fails to show any error in the Tax Court's decision. We have considered the arguments raised by the petitioner on appeal: (1) that petitioner could not advertise his labor law specialty; (2) that the statute of limitations bars the deficiency because the examination was unsigned; (3) that the form 2440s were detached from the returns; (4) that the Commissioner has admitted the deductibility of the business expenses; and (5) that the Tax Court improperly added $652 to the computations under Tax Court Rule 155 and find them to be without merit. See 10th Cir. R. 17(b).

The judgment of the United States Tax Court is AFFIRMED.

The mandate shall issue forthwith.

s/ Howard K. Phillips

Howard K. Phillips Clerk

APPENDIX B

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UNITED STATES TAX COURT

MORRIS I. COHEN, Petitioner v. COMMISSIONER OF INTERNAL REVENUE Respondent	)	Docket No. 7078-82

STIPULATION

It is hereby stipulated that the the attached Schedule I shows the computation of adjusted gross income, taxable income and income tax liability of the petitioner for the taxable years of 1978, 1979 and 1980, based upon the figures reported on those returns (including the net operating loss statements), and allowing disability exclusions for each of thos years in the amount of $5200.00. The attached schedule does not reflect the respondent's disallowance of Schedule C expenses for the years 1978, 1979 and 1980.

Joel Gerber
Acting Chief Counsel
Internal Revenue Service

By: Signed George G. Young
George G. Young
District Counsel

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June 22, 1983

MIC

Morris I. Cohen
11281 Alameda Ave.
Apt. 2
Aurora, Colorado 80012

Morris I. Cohen Docket No 7078-82

I - Returns adjusted for disability income exclusion

	1978	1979	1980
Interest Income			
Return	$6,979.00	$7138.00	$12,429.00
Schedule C (loss)			
Return	(13,337.00)	($8025.00)	(9730.00)
Disability Income			
Gross	$7,911.00	$8,634.00	$9,756.00
Disability Incom e			
Exclusion	($5200.00)	($5200.00)	($5200.00)
Adjusted Gross Income			
Before NOL	(3,647.00)	2,547.00	$7255.00
Zero Bracket Amt.			
Non-business	(2200.00)	(2300.00)	(2300.00)
1978 Net Operating Loss	$5847.00)		
1979 and 1980 Section 172(d)	247.00		r955.00
Modified Taxable Income:			
1977 Net Operating Loss	($19,912.00)		
1978 Return		(19,665.00)	(19,665.00)
Unused Net Operating Loss 1977			(14,710.00)

Summary:

No tax liability in any of the tax years 1978, 1979 or 1980.

Unused net operating loss carryovers to years subsequent to years 1980.

1978	$(5,847.00)
1977	(14,210.00)
Total	$20,557.00)

APPENDIX C

MORRIS I. COHEN,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No.
	)	
COMMISSIONER OF INTERNAL REVENUE	)	7078-82
	)	
Respondent	)	

Decision

Pursuant to the opinion of the Court filed May 3, 1984, and incorporating herein the facts recited in the respondent's amended computation as the findings of the Court, it is ordered and decided

That there is no deficiency in income tax due from the petitioner for the taxable years 1978 and 1979, and

That there is a deficiency in income tax due from the petitioner for the taxable year 1980 in the amount of $1149.00.

s/ W. Drennen

Judge

Date Sept. 26, 1985

Amended computation Statement

In re: Morris I. Cohen
1096 S. Elkhart Way Apt. 104
Aurora, Colorado 80013

INCOME TAX

	1978	None
Deficiency		
	1979	None
Deficiency		
Deficiency	1980	$1149.00

The details supporting the deficiency noted above are set forth on attached pages 1-4 inclusive.

Statement--Income Tax Changes

Adjustments tp Income

Morris I. Cohen	1978	1979	1980
a. Net operating loss from page 2	($7490.00)	(18,272.00)	$4150.00
b. All schedule C expenses	13,337.00	8025.00	9730.00
2. Total Adjustments	5847.00	(247.00)	5580.00
3. Return	(364700)	2537.00	7255.00
4. Tax Table Inc.	2200.00	2300.00	12,835
5. Tax Table	None	None	12,835.00
			$1801.00
11. Total Corrected Income Tax			$1801.00
12 Tax on Return			652.00
13 Increase or decrease			$1149.00

APPENDIX D

STIPULATIONS

Appellee ignored a stipulation signed by the parties under Rule 91(e) of the United States Tax Court Rules

Rule 91(e) of the Tax Court Rules States as follows:

> 91(e) Binding effect. A stipulation shall be treated with respect to the extent of its terms as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party a party to the stipulation to qualify, change or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding

APPENDIX E

Internal Revenue Code Section 6501

Provision for 3 year statute of limitations due to fraud of removing forms 2440 from all three years of the case files.

Internal Revenue Code Section 6501

Signing of returns and other documents.

Any return statement or other document required to be made with respect to a tax imposed by Chapter 42 or the regulations thereunder shall be signed by the person required to file such a return, statement or document or by such other persons duly authorized to sign in accordance with the regulations forms or instructions prescribed with respect to such return statement or other document. The lerson required or duly authorized to make the return may incur liability for penalties provided for erroneous false or fraudulent returns. Emphasis supplied.

APPENDIX F

Rule 155(a)

Agreed computations. Where the Court has filed or stated in its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision pursuant to the findings and conclusions of the Court, they, or either of them shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency, liability or overpayment and that there is no disagreement that the figures shown are in accordance with the findings and conclusions of the Court. The Court will then enter is decisiion.

Supreme Court, U.S.
FILED
MAR 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1176

In the Supreme Court of the United States

OCTOBER TERM, 1985

MORRIS I. COHEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1176

MORRIS I. COHEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that his alleged business expenses did not qualify for a tax deduction because they did not arise from an activity engaged in for profit.

1. The facts, as found by the Tax Court,[1] are as follows. Petitioner was employed from 1942 to 1963 by the United States Department of Labor (48 T.C.M. (CCH) 5 (1984)). In 1963, at the age of 48, he retired on disability and enrolled in law school (*id.* at 5-6). In 1967, after graduation and admission to the Indiana State Bar, he sought to establish a law practice in Indianapolis as a sole practitioner (*id.* at 6). Between 1967 and 1970, he represented two clients, one of

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[1]The Tax Court's memorandum decision is unofficially reported at 48 T.C.M. (CCH) 5 (1984). Because petitioner has not reprinted the Tax Court's findings of fact in the appendix to his petition, we will refer to the appropriate pages of the unofficial report.

whom paid him a fee of $5,000 (*ibid.*). Between 1970 and 1973, he had a small number of potential clients referred to him by the Indianapolis Bar Association; the income that he received as a result of these referrals, if any, was minimal (*ibid.*). Petitioner received no further referrals from the Indianapolis Bar Association after 1973, and he thereupon concluded that he would be unable to establish a successful law practice (*ibid.*). He reported no income from the practice of law during the tax year at issue or during the immediately preceding tax years (*ibid.*).

On his federal income tax return for 1980, petitioner deducted various items under Section 162 of the Code[2] as ordinary and necessary expenses allegedly incurred in the "trade or business" of practicing law. These items included one-half of the rent on his four-room apartment, expenses connected with two lawsuits in which he was a plaintiff, the cost of a listing in the white pages of the telephone book, the cost of a subscription to the Burns Indiana Annotated Statutes, and kitchen utensils and clothing (48 T.C.M. at 6; Tr. 37-41, 50).

The Commissioner on audit disallowed the claimed deductions, and petitioner sought redetermination of the resulting deficiency in the Tax Court. That court noted the well-settled rule that a taxpayer is entitled to claim business-expense deductions in connection with an activity only if he shows that "he engaged in [that] activity with an honest and bona fide objective of making a profit" (48 T.C.M. at 7). The court observed that the question whether a taxpayer has a genuine profit-making motive is "a question of fact" (*ibid.*), and it held that petitioner had failed to carry his burden of proof on that score (*id.* at 8). Specifically, the

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[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

court found "no evidence in the record that petitioner did legal work for any clients * * * or spent any time on legal work" during the relevant years, and it found that he had "received no income from the practice of law during those years" (*ibid.*). The court further found that petitioner had engaged in no activity calculated to attract clients or to produce income as an attorney, and it accordingly concluded that he had abandoned any law practice that he may once have had (*id.* at 8, 9). The court determined a deficiency in petitioner's income tax for 1980 in the amount of $1,149 (Pet. App. C1).[3]

The court of appeals affirmed in an unpublished judgment order (Pet. App. A2-A4). It held that "the Tax Court correctly determined that petitioner did not carry his burden of proof regarding the deductibility of [his] alleged business-related expenses" (*id.* at A3). The court noted that petitioner had proffered a miscellany of other arguments, arguments that it had considered and found "to be without merit" (*ibid.*).

2. It is well established that an expense is not deductible under Section 162 unless it is attributable to an activity engaged in by the taxpayer with the objective of earning a profit. *E.g., United States* v. *Gilmore,* 372 U.S. 39, 46 (1963) ("[T]he only kind of expenses deductible [under the predecessor of Section 162] are those that relate to a 'business,' that is, profit-seeking, purpose."); *Snyder* v.

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[3]The Commissioner also sought to establish a deficiency in petitioner's income tax for 1978 by seeking to disallow petitioner's claimed net operating loss carryover from 1977 (48 T.C.M. at 6-7). The Tax Court resolved this question in petitioner's favor, finding that the Commissioner had failed to preserve the issue in his notice of deficiency, in his pleadings, or at trial (*id.* at 9-10). The only other matter raised in the notice of deficiency, concerning the proper calculation of petitioner's disability income exclusion for 1978-1980, was resolved by stipulation of the parties after trial (*id.* at 5 n.1).

United States, 674 F.2d 1359, 1363-1364 (10th Cir. 1982); *Faulconer* v. *Commissioner*, 748 F.2d 890, 892-894 (4th Cir. 1984); *Estate of Power* v. *Commissioner*, 736 F.2d 826, 828-830 (1st Cir. 1984). The question whether a taxpayer has a genuine profit-seeking objective is essentially one of fact. *Carter* v. *Commissioner*, 645 F.2d 784, 786 (9th Cir. 1981). The Treasury Regulations set forth guidelines for making this factual determination. Treas. Reg. § 1.183-2(b).[4]

Here, petitioner essentially conceded that he abandoned any hope of profiting from the practice of law when he ceased having business referred to him by the Indianapolis Bar Association in 1973. See 48 T.C.M. at 6. As the Tax Court found, petitioner thereafter did not "hang out his shingle" (*id.* at 8) and spent no time performing legal work. These factual findings were amply supported by the record, and the court of appeals correctly determined that petitioner failed to show them clearly erroneous.[5]

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[4]The Regulations provide that, in determining whether an activity is engaged in for profit, all the facts and circumstances with respect to the conduct of the activity are to be taken into account, including (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation inherent in carrying on the activity.

[5]Petitioner in this Court seems to have abandoned his contention that the Tax Court's factual findings were clearly erroneous, confining his petition mainly to a congeries of Fourth and Fifth Amendment claims. Only one of these claims merits any response. Petitioner asserts that the parties' post-trial stipulation in the Tax Court (see Pet. App. B1-B4) showed him as having no tax due for 1980, and hence contends that the Commissioner was estopped to assert any tax deficiency for 1980 stemming from disallowance of petitioner's business-expense (or "Schedule C") deductions. See Pet. 11, 17-18. The post-trial stipulation, however,

3. Although petitioner does not raise the point, we note that the "trade or business" question decided by the courts below is unrelated to the question presented by the government's petition for certiorari in *Groetzinger* v. *Commissioner*, 771 F.2d 269 (7th Cir. 1985), petition for cert. pending, No. 85-1226. The question there is whether a full-time gambler, who concededly engaged in wagering activities with the intent to earn a profit, can properly be deemed to be in a "trade or business" for tax purposes despite the fact that he does not hold himself out to others as offering goods or services for a price. Because the courts below found as a fact that petitioner did not have the requisite intent to make a profit, and hence that he was not engaged in a "trade or business" for that reason, those courts had no need to consider, and did not consider, whether a taxpayer must offer "goods or services" in order to qualify for trade-or-business status. There is, of course, no doubt that legal services qualify as "goods or services," when offered with the intent to earn a profit. The disposition of the instant petition thus does not depend upon the Court's resolution of the circuit conflict involved in *Groetzinger*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

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expressly preserved that issue for decision after trial, stating that the computations set forth in the stipulation covered only the other issues in the case and "d[id] not reflect [the Commissioner's] disallowance of Schedule C expenses * * * for 1980" (Pet. App. B1). The court of appeals thus correctly rejected petitioner's contention that the Commissioner by virtue of the post-trial stipulation "ha[d] admitted the deductibility of the business expenses" (Pet. App. A3).

EDITOR'S NOTE

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PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Petitioner takes exception to respondent's allegation that he was not engaged in the practice of law for profit. It is submitted that petitioner spent 4 years in law school at an estimated cost of $40,000.00 to obtain a degree and to pass the Indiana State Bar examination on the first try. By the Regulations of the Internal Revenue Service

petitioner was not engaged or spent funds for a hobby as described in the regulations. Petitioner did not ever refuse to receive payment and was ready willing and able to engage in the practice of law for profit. Petitioner reported a $5,000.00 adjusted gross income tax on his 1967 tax return and subsequently earned fees on later on other cases. Petitioner notes that the Court not once asked him if he received payment for his services. The Court acknowledged that petitioner was precluded from advertising at this time because of the ban on advertising by members of the bar.

Respondent erred in stating that there was a post trial stipulation atp. 3 in respondent's memorandum as a note. Petitioner did not ever sign or agree to a post trial stipulation as stated in the aforementioned note. There was no contact by any of the parties after the trial. In fact the last communication petitioner received was an exact duplicate of the pre-trial stipulation (Pet. B-1 and B-2) and the computation at (pet. B-3 and B-4) showing a credit of $20,557.00. The foregoing was subsequently

amended (Pet. C-3) as a deficiency of $1149.00 with no reason being given for the amended computation and within 5 days after the original pre-trial stipulation. At no time after the the trial was petitioner asked to sign any stipulation after the trial and must be a figment of respondent's imagiration that he was a party to a post trial stipulation. In addition petitioner was not given the opportunity to object to the new computation showing a deficiciency of $1149.00 as required by Tax Court Rule 155. Pet. F-1)

The definition per se of a stipulation of the parties is both parties are required to agree and sign the stipulation. (Pet. D-1) Respondent uses as his authority for the post-trial stipulation (Pet. App. A3). The petitioner was not even granted a hearing by the Appellate Court and was not in any courtroom or confrontation with respondent's attorneys subsequent to the lower court trial. There is nothing in the docket sheet of the lower

court which indicates that a post-trial stipulation was entered into by the parties. Petitioner submits furthermore that the argument of respondent is not valid as to the profit motive. If petitioner had engaged in some other activity there might be a valid argument that there was not a profit motive by petitioner, but the mere fact that petitioner had accepted fees in the practice of law is in itself sufficient to /negate the non-profit motive. Furthermore any one who practices law without a license in the State of Indiana is subject to criminal prosecution. Petitioner expended over $40,00.00 to go to law school for 4 years and it was not a picnic as any one who has ever attended law school would attest to. That in itself is sufficient to establish a profit motive. Respondent is equating bad luck to a no-profit motive. Many corporations go three years without earning a profit, but that is no sufficient reason for saying that they have no profit motive. Petitioner did pay taxes as an attorney in 1967 when he had a profit of over $5,000.00. The raison de etre for going to law school in

petitioner's circumstances was to earn a livlihood. A promise that he would be granted employment after petitioner passed the Indiana Bar was not fulfilled and petitioner was left on his own. The lower court makes the observation that petitioner was not allowed to advertise. Th description the lower court (U.S. Tax Court) makes of the typical lawyer is nothing but an ambulance chaser and there is not much "hanging around by the lawyer." Syllogistic reasoning would indicate that as a major premise petitioner went to law school and passed the bar so that he could practice law: a minor premise that he did practice law: and the conclusion that he was therefore in the practice law to earn a livlihood. (Profit motive)

Petitioner submits that he was denied due process of law when the United States Tax Court had outside input into its decision. At (Pet. A-1 d) a reference is made to the telephone directory. Petitioner did not or was not allowed to present this in his testimony. In addition the Court at the same place made reference to the Yellow Pages of the telephone directory whic was not

even mentioned at the trial and must have been supplied by an outside person. The reference was to the fact that petitioner was listed in the white pages of the directory and not in the Yellow Pages. The Tax Court in its Opinion (P A-1 i' that petitioner testified that he had a brother in California whom he went to visit which is a falsehood. Petitioner never had a brother who resided in California. He has three brothers: one has lived in Chicago for the last 20 years, one has lived in Gary Indiana and its environs for over thirty years and the other brother has lived in Indianapolis all of his life. Petitioner has reason to believe that this was injected into the opinion to give him "needles" as it said in the vernacular and had reference to the fact that his brother who is a lawyer reneged on his offer to employ petitioner. The reason for the delay of submitting an opinion for over 15 months is indicative of the attitude of the Tax Court. Interest on the deficiency was accumulating at over13 % interest.

Respondent does not respond to petitioner's allegation that forms 2440 (certificate of exemption for physical disablity) were removed from the three files (1978, 1979 and 1980 and was the basis on which the original assessment was made. The three years would have amounted to $15,600.00 (3 times $5200)

Respondent has tried to obfuscate the foregoing removal of an integral part of his tax returns, but the salient fact remains that that the parties signed a pre-trial stipulation providing for inviolability of the disability exclusion pursuant to 105(d) of the Internal Revenue Code of 1954 and then respondent's attorneys reneged on the only stipulation in the case.

Having been an enforcement agent for the Wage & Hour Division of the United States Department of Labor for over 21 years petitioner is outraged that:

1. The deficiency was based on a stripped file and assessed therefor;

2. The assessment was unsigned

contrary to the Internal Revenue Code. (Sudden thought--what would happen if a taxpayer did not sign his tax return?)

3. Petitioner was not given a chance to rebut the deficiency contrary to due process of law as delineated by the due process clause of the Fifth Amendment of the United States Constitution.

Any of the foregoing 3 examples would have prejudiced the case by the Wage & Hour Division.

The United States Tax Court Rules are patterned after the United States District Court Rules. There is no provision in the rules for a change of judge. Judge Thornburgh, Jr., had the case for six months and then Judge Drennen took over. This is a denial of procedural due process and indicates a major deviation from the rules, and remphasizes the fact that petitioner was not given a "fair shake".

No mention is made of the fact that petitioner had alleged that his sister played an active part in the scenario.

Petitioner respectfully submits that his

petition for writ of certiorari be granted.

MORRIS I. COHEN

Attorney at law